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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYNEL DORROUGH, Defendant and Appellant.	B285742 (Los Angeles County Super. Ct. No. PA087007)

APPEAL from a judgment of the Superior Court of Los Angeles County. David W. Stuart, Judge. Affirmed in part, remanded in part for further proceedings.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

The Law Offices of Beles & Beles, and Robert J. Beles for Defendant and Appellant.

* * * * * *

Upset that another motorist prevented him from illegally driving down the paved shoulder of a freeway, Raynel Dorrough (defendant) retrieved a gun from the trunk of his gridlocked car, aimed it at the occupants of the other motorist's car, and minutes later again aimed it at the occupants while threatening to "smoke you motherfuckers if you call the cops." A jury convicted defendant of assault with a firearm, making criminal threats and unlawful firearm activity. On appeal, defendant argues that the trial court made two evidentiary errors and that he is entitled to a remand under the newly enacted Senate Bill 620. Defendant's attacks on his convictions lack merit, but he is entitled to a remand to enable the trial court to decide whether to exercise its newfound discretion to strike the firearm enhancements imposed in this case. Accordingly, we affirm defendant's convictions but remand.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The crimes*

On a swelteringly hot afternoon in late July 2016, a big rig caught fire in the Grapevine portion of the Interstate 5 freeway north of Los Angeles. Only the leftmost lane of the northbound I-5 remained open. Traffic was inching forward.

On their way home from an afternoon Dodger game, David Kelly (Kelly), his wife and two children (ages 15 and 10) were caught in this northbound traffic. Irked that motorists using the paved, center-divider shoulder to bypass the jam were only making things worse, Kelly and another driver behind him pulled

their cars halfway into the shoulder to block those motorists from passing.

A blue Mercedes or BMW driving in the shoulder forced the car behind Kelly's to move back into the leftmost lane of traffic. When Kelly refused to move his car, defendant got out of the Mercedes or BMW, retrieved a black backpack, and returned to his car. Moments later, defendant—from inside his car and through his windshield—pointed a gun at Kelly's car. The gun was black and "appeared to be a Glock." Kelly immediately pulled fully into the shoulder and, attempting to put some distance between his family and defendant, drove away at high speed. Defendant followed.

A few minutes later, after the shoulder ended and Kelly was back in the stop-and-go traffic, the blue Mercedes or BMW came up along the passenger side of Kelly's car. The windows of Kelly's car were down. Defendant extended his left arm out his driver's side window, pointed the gun at Kelly's car, and yelled, "If you are on the phone with the cops, I'll smoke you mother fuckers." Both Kelly and his son heard this statement. Kelly again pulled into the shoulder (which had since restarted), and again drove off at high speed.

Kelly's wife called 911, and the 911 operator directed Kelly to drive to the law enforcement officers overseeing the clean-up of the big rig accident. As Kelly was outside his car speaking with an officer, defendant drove by. Kelly pointed him out, and defendant sped off at speeds in excess of 100 miles an hour. The police were unable to overtake him.

B. *Defendant's arrest*

Defendant was arrested approximately an hour later, some 22 miles up the road, while secreted inside a Denny's restroom.

No gun was recovered. As defendant was being booked, he looked the booking officer in the eye, smiled, and spontaneously said, "You didn't find what you were looking for, did you?"

Defendant was subsequently released from custody.

C. *Defendant's subsequent possession of a black Glock firearm*

In late October 2016, defendant was filmed with a black Glock firearm in his lap.

In early November 2016, defendant was arrested in Yolo County. Defendant had been driving a black Mercedes. Inside that car, police recovered (1) a loaded, black, semi-automatic Glock firearm, which was "underneath the driver's seat," and (2) defendant's driver's license, which was on the floorboard below the steering wheel.

Kelly testified that he was familiar with guns, and that while he could not "say for certain" that the gun depicted in a screenshot from the October 2016 video and the gun seized from defendant in November 2016 was "the exact same gun" as the gun defendant pointed at him in July 2016, Kelly testified that they were "similar." Kelly's son testified that the guns he was shown from the October and November 2016 incidents were "extremely similar" to the gun he saw defendant point at him in July 2016. A firearm expert testified that the gun depicted in the October 2016 video and the gun seized from defendant in November 2016 were "very similar" insofar as they each had their plating "bent down almost to the same exact point."

II. Procedural Background

The People charged defendant with (1) four counts of assault with a semi-automatic firearm (Pen. Code, § 245, subd.

(b)),[1] one for each of the four occupants of Kelly's car; (2) two counts of making criminal threats (§ 422), one for each person who heard defendant's "smoke you fools" comment (that is, Kelly and his son); and (3) one count of unlawful firearm activity for defendant's possession of a firearm after a juvenile adjudication (§ 29820, subd. (b)).[2] The People further alleged that defendant "personally used a firearm" for the assault and criminal threats counts (§ 12022.5).

A jury convicted defendant of all of the above described charges and found the firearm enhancement to be true.

The trial court sentenced defendant to prison for 12 years and four months. The court imposed a nine-year prison sentence for assaulting Kelly with a firearm (count 1), calculated as a base sentence of six years plus a low-end term of three years for the firearm enhancement. The court then imposed a consecutive 40-month prison sentence (count 2), calculated as a base sentence of two years (that is, one third of the middle term of six years) plus 16 months for the firearm enhancement (that is, one third of the middle term of four years). The court imposed concurrent 10-year prison sentences on the remaining assault with a firearm counts, concurrent (but stayed) six-year sentences on the criminal

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The People also charged defendant with attempted criminal threats against Kelly's wife (§§ 664, 422, subd. (a)) and with dissuading a witness by force or threat (§ 136.1, subd. (c)(1)). However, the People dismissed the attempted criminal threats count after they rested their case-in-chief at trial, and the jury acquitted defendant of the dissuasion count.

threats counts, and a concurrent two-year sentence on the unlawful firearm activity count.

Defendant filed this timely appeal.

DISCUSSION

I. Evidentiary Issues

Defendant argues that the trial court erred in (1) admitting evidence pertaining to his possession of a gun in October 2016 and November 2016 because that evidence showed, at most, that he was "the sort of person who carries deadly weapons"—which is an impermissible purpose under Evidence Code sections 1101 and 352 (see *People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*), overruled on other grounds, *People v. Morse* (1964) 60 Cal.2d 631); and (2) admitting evidence of his statement to the booking officer because it was not disclosed until midway through trial, in violation of the Criminal Discovery Act (§ 1054 et seq.). We review both claims for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 586 [evidentiary rulings]; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 466 (*Mora*) [discovery rulings].)

A. *The October and November 2016 incidents*

It is well settled that evidence of a person's propensity to engage in certain contact "is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) This is why evidence that a defendant's possession "of a weapon not used in the crime charged" is generally inadmissible, as it "leads logically only to an inference that [the] defendant is the kind of person who surrounds himself with deadly weapons." (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1392; *Riser*, *supra*, 47 Cal.2d at p. 577; *People v. Henderson* (1976) 58 Cal.App.3d 349, 360; *People v. Barnwell* (2007) 41

Cal.4th 1038, 1056; see *People v. Riggins* (1910) 159 Cal. 113, 120-121.)

However, this general rule of inadmissibility does not apply when the weapon the defendant at some other time possessed "resemble[s]," is "similar" to, "looks like," or "'might have been'" the weapon used in the charged crime(s) because the prior or subsequent possession of potentially the same weapon tends to prove a defendant's identity as the perpetrator or his use of the weapon at issue during the charged crime(s).[3] (*People v. Ferdinand* (1924) 194 Cal. 555, 563 (*Ferdinand*); *People v. Radovich* (1932) 122 Cal.App. 176, 180-181 (*Radovich*); *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052.) For these purposes, "positive[] identif[ication]" that the weapons are the same is not required. (*Radovich*, at p. 180; *Ferdinand*, at p. 563 ["clear, certain, and positive proof" not required]; *People v. Hale* (1927) 81 Cal.App. 734, 735 ["clear and positive identification" not required].)

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3 The rule also does not apply when the weapon—even if certainly not the weapon used in the charged crime(s)—is relevant for any other non-propensity purpose under Evidence Code section 1101, subdivision (b). (*People v. Cox* (2003) 30 Cal.4th 916, 956-957 [so noting], overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1248-1249 [defendant's possession of knives not used in murder, but "which could be used in armed robbery . . . in furtherance of the criminal plan"]; *People v. Jablonski* (2006) 37 Cal.4th 774, 822 [defendant's possession of weapons "relevant to premeditation"]; *People v. Farnam* (2002) 28 Cal.4th 107, 156-157 [defendant's possession of weapon "tended to establish that defendant was the perpetrator"].)

Applying these principles, the trial court did not abuse its discretion in admitting the evidence that defendant possessed a black, semi-automatic Glock in October 2016 and in November 2016. That is because both Kelly and his son testified that the gun they saw defendant wield during the charged July 2016 incident was, respectively, "similar" and "extremely similar" to the guns defendant possessed in October and November 2016. What is more, the trial court so ruled only after conducting a hearing outside the presence of the jury to inquire whether Kelly was going to testify that the weapons were "similar" (as the People had proffered). The trial court also gave the jury a limiting instruction—at the time the evidence was introduced as well as at the conclusion of trial—admitting the evidence only "for the limited purpose of deciding whether or not the People proved that [] defendant possessed a firearm for all the charges listed in the information on July 27, 2016" and expressly prohibiting its use to "conclude . . . that [] defendant has a bad character or is disposed to commit crime." Given the probative value of this evidence under the above stated precedent and the limiting instructions' effect in mitigating the danger of any unfair prejudice, the trial court also did not abuse its discretion in admitting this evidence under Evidence Code section 352. And because the admission of evidence complied with state evidentiary law, it did not violate any of the federal constitutional provisions defendant cites. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26 [properly applying ordinary rules of evidence does not violate federal constitutional rights].)

B. *Defendant's spontaneous statement during booking*

Under California's Criminal Discovery Act (the Act), the "prosecuting attorney" is required to disclose "[s]tatements of all

defendants" (§ 1054.1, subd. (b)), and, absent "good cause," is required to do so "at least 30 days prior to the trial" (§ 1054.7). If the prosecuting attorney violates the Act (and if the defendant had previously made a written request for discovery), a court may consider a number of sanctions ranging from "immediate disclosure," to a continuance, to an instruction advising the jury "of any untimely disclosure," to the preclusion of testimony. (§ 1054.5, subds. (b) & (c).) Preclusion of testimony is meant to be used only as a last resort, "if all other sanctions have been exhausted." (§ 1054.5, subd. (c).)

The trial court did not abuse its discretion in refusing to exclude defendant's spontaneous statement to the booking officer for two reasons. First, the Act itself did not mandate the disclosure of defendant's statement until the prosecutor learned of it. By its terms, the Act's disclosure duties extend only to "materials and information" if (1) it is "in the possession of the prosecuting attorney" or (2) "the prosecuting attorney knows it to be in the possession of . . . investigating agencies." (§ 1054.1.) Thus, if the materials or information is neither in the prosecutor's possession nor is something she knows is possessed by investigating agencies, there is "[n]o statutory violation." (*People v. Whalen* (2013) 56 Cal.4th 1, 65, fn. 27 (*Whalen*); *People v. Verdugo* (2010) 50 Cal.4th 263, 288-289 [same].) Here, defendant's statement was made to the booking officer, but was not memorialized in the officer's report or otherwise relayed to the prosecutor until the middle of trial (at which point the prosecutor immediately told defendant's attorney). Because the statement was neither in the possession of the prosecuting attorney nor something she knew about, she was not required to

disclose it any sooner than she did (namely, when she first learned about it mid-trial).

Second, defendant has not established a "reasonable probability" that "the result of the proceedings would have been different" had defendant's statement been disclosed at least 30 days prior to trial. (*Mora*, *supra*, 5 Cal.5th at p. 467.) As a threshold matter, it is not reasonably probable that the court would have *excluded* the testimony given that exclusion is a remedy of last resort. (§ 1054.5, subd. (c).) Further, defendant himself could not articulate how he was prejudiced by the mid-trial disclosure. When asked, defendant offered only, "Perhaps it would be relevant to negotiation discussions" and that the late disclosure "makes [the booking officer's statement] inherently unreliable." But the record belies the assertion that defendant would have been any more willing to accept a plea offer; he unequivocally rejected all prior plea offers from the People. And defendant was able to—and did—cross examine the booking officer as to why he did not include the statement in his report, thereby enabling him to suggest to the jury that the booking officer's testimony was inherently unreliable.

Defendant nevertheless urges that the statement should have been excluded for two further reasons.

First, he argues that prosecutors are deemed to know what their investigating officers know, such that the prosecuting attorney's unawareness of the defendant's statement to the booking officer is irrelevant to whether there is a violation of the Act. For support, defendant cites *In re Littlefield* (1993) 5 Cal.4th 122 (*Littlefield*) and *People v. Little* (1997) 59 Cal.App.4th 426 (*Little*). While prosecutors are deemed to know what all members of the """prosecution team""" know for purposes of their due

process-based duty to disclose favorable, material evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), the Act does not impute such knowledge: As noted above, the Act only reaches "materials and information" in the prosecuting attorney's "possession" or which she "knows . . . to be in the possession of the investigating agency" (§ 1054.1), and does not reach evidence neither possessed nor known by the prosecuting attorney (*Whalen*, *supra*, 56 Cal.4th at 65, fn. 27). *Littlefield* and *Little* are distinguishable: *Littlefield* held that defense attorneys (and, by extension, prosecuting attorneys) are required by the Act to disclose information "'readily available'" to them but which they chose not to learn (*Littlefield*, at pp. 135-136), and *Little* applied *Littlefield* to impose a duty upon prosecuting attorneys to obtain rap sheets of witnesses because prosecutors have special access to those rap sheets (*Little*, at pp. 432-433). Apart from whether these cases remain good law after *Whalen*, these cases do not apply where, as here, there is no evidence that the prosecutor was willfully choosing not to learn information or had special access to the information. Indeed, the only way to agree with defendant's position in this case would be to require prosecuting attorneys to interview every participating investigating officer about every detail in the officer's report in the hopes that they might reveal additional unreported information. But this would all but eviscerate the general rule from which *Littlefield* acknowledged it was fashioning a narrow exception—namely, the general rule that prosecutors "ha[ve] no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*Littlefield,* at p. 135.)

Second, defendant argues that admitting the booking officer's testimony regarding defendant's statement sanctions the type of "gamesmanship [that] is inconsistent with the quest for truth, which is the objective of modern discovery." (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165, quoting *Littlefield*, *supra*, 5 Cal.4th at p. 133). However, there is no evidence of gamesmanship here. The booking officer testified, without contradiction, that he was a brand new officer who admittedly made a "mistake" in not including defendant's statement in his report.

II. Sentencing Issue

Defendant argues, and the People concede, that he is entitled to a remand for the trial court to consider whether to strike the firearm enhancements imposed in this case. Among other things, Senate Bill 620 amended section 12022.5 to grant trial courts the discretion to strike enhancements for the personal use of a firearm. (§ 12022.5, subd. (c); Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 1.) Because this law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless our Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature expressed no such intent with Senate Bill 620. Accordingly, defendant is entitled to the benefit of the amendments to section 12022.5 and thus is entitled to a remand to allow the trial court to exercise its newfound discretion. In light of the trial court's selection of the low-end sentence for the firearm enhancement and its decision to run several sentences concurrently, there is no clear indication in the record that the trial court would not have stricken this

enhancement at the time of sentencing had it been aware of its discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

DISPOSITION

The case is remanded for resentencing to allow the trial court to consider whether the enhancements under section 12022.5 should be stricken. In all other respects, defendant's conviction is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ